Supreme Court, U.S.
FILED

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No. ——— OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CSX TRANSPORTATION, INC.,
Petitioner,

v.

CLYDE SIRBAUGH, JR.,
Respondent.

Petition for a Writ of Certiorari to the Circuit Court of Berkeley County, West Virginia

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether damages awarded pursuant to a claim under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, should be apportioned among various causes of the employee's injury.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE STATEMENT

The only parties to this proceeding are CSX Transportation, Inc. and Clyde Sirbaugh, Jr.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner CSX Transportation, Inc. states that CSX Corporation is its parent company. CSX Transportation, Inc. further states that the following are its nonwholly owned subsidiaries:

Allegheny and Western Railway Company
The Baltimore and Cumberland Valley Rail Road Extension Company
The Central Railroad Company of South Carolina
The Cincinnati Inter-Terminal Railroad Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
The Home Avenue Railroad Company

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Petition for a Writ of Certiorari to the Circuit Court of Berkeley County, West Virginia

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PETITION FOR A WRIT OF CERTIORARI

CSX Transportation, Inc. hereby petitions for a writ of certiorari to review the judgment of the Circuit Court of Berkeley County, West Virginia in this case.

OPINIONS BELOW

The orders of the West Virginia Supreme Court of Appeals denying the petition for appeal (App. 1a) and denying the renewed petition for appeal (App. 2a) are not reported. The judgment of the Circuit Court of Berkeley County, West Virginia [redacted] is not reported, was entered on December 15, 1995, and is reprinted in the Supplemental Appendix at 11a-12a. The post-trial Order denying Defendant's Motion was entered on February 15, 1996 and is reprinted at 13a.

JURISDICTION

The order of the West Virginia Supreme Court of Appeals denying rehearing was entered on October 8, 1996. The order denying the renewed petition for appeal was entered on November 21, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

45 U.S.C. § 51 provides, in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of . . . such carrier, or by reason of any defect or insufficiency, due to its negligence . . . in its . . . equipment.

STATEMENT

This case raises the fundamental question under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, as to whether damages based on exposure to toxic substances while employed should be apportioned among the various causes of an employee's illness or whether, as the court below held, the railroad is liable for the entire "injury" so long as the railroad's negligence plays any part in causing the harm. The decision below is in direct conflict with the holdings of another state supreme court and a decision of the Seventh Circuit, and it finds no support in any decision of this Court.

Respondent is a former employee of the Baltimore and Ohio Railroad Company and the Chessie System, which are now part of petitioner. Initially, respondent was employed as a cook and then later as a trackman. He retired in 1987 at the age of 49 as a result of heart problems.

Respondent filed this lawsuit in the Circuit Court of Berkeley County more than five years after retiring, alleg-

ing that he suffered from shortness of breath and other illnesses because of exposure to asbestos during his employment. Respondent never worked as an asbestos insulator, never handled raw asbestos and never even worked with individuals who did handle raw asbestos. Thus, respondent's exposure to asbestos during his employment was extremely limited.

Respondent made no claim for lost wages. His claim for actual damages was limited to the costs of past and future medical treatment for respiratory ailments allegedly attributable to exposure to asbestos while employed by petitioner. It was undisputed that respondent smoked cigarettes, that he was significantly overweight, and that he had a heart condition.

Petitioner offered an instruction that would have required the jury to apportion damages and thereby restrict respondent's recovery against petitioner only to the amount of damages attributable to petitioner's negligence. App. 4a. The Circuit Court rejected that instruction. App. 5a. Thus, over petitioner's objection, the jury was instructed that in assessing damages it could not consider any negligent act or omission of respondent—cigarette smoking or failure to lose weight—in assessing comparative fault. Instead, the jury was instructed that "as long as you find that the railroad's negligence played any part, no matter how slight, in causing injury" to respondent, then it was appropriate to find the railroad wholly liable for the full amount of respondent's injuries. App. 9a. Based on these instructions, the jury awarded respondent $2.5 million, which included $100,000 for the existing respiratory injury, $600,000 for past pain and suffering, $1.5 million for future pain and suffering and $300,000 for future medical expenses.

Petitioner filed a petition for appeal in the West Virginia Supreme Court of Appeals. West Virginia is one of only two states that does not provide any mandatory appellate review in civil actions. The Supreme Court summarily denied review. Petitioner filed a renewed peti-

tion for appeal, which also was denied in a one-page order.

REASONS FOR GRANTING THE PETITION

Without question, this is an unusual case. Petitioner has been ordered to pay $2.5 million to an employee who had been retired for more than five years. His respiratory problems arguably had some link to exposure to asbestos while employed by petitioner, but there can be no serious question that smoking, obesity and his heart ailments contributed to his problems. Nevertheless, the jury was ordered to disregard these other causes and to award full compensation to respondent so long as petitioner's negligence in any way contributed to respondent's injury. This ruling, which was refused review by the only appellate court in West Virginia, is squarely inconsistent with decisions of both the Pennsylvania Supreme Court and the Seventh Circuit. If the supreme court in West Virginia had granted review and decided this issue squarely, there would be no question that the issue should be reviewed by this Court. Review of the legal issue posed in this case should not be denied simply because West Virginia's judicial system permits it to sweep erroneous rules of law under the rug.

1. The decision of the Circuit Court refusing to give the apportionment instruction proffered by petitioner could not be more flatly inconsistent with the holding of the Pennsylvania Supreme Court in *Dale* v. *Baltimore & Ohio Railroad*, 552 A.2d 1037 (Pa. 1989). In that case, as here, plaintiff alleged that he suffered from a respiratory ailment due to exposure to asbestos while employed by the railroad. The railroad offered evidence that the illness had been caused by other factors. The jury was instructed that the railroad was responsible for all damages arising out of the plaintiff's injury, even though other causes were asserted by the railroad.

In reversing and remanding for a new trial, the Pennsylvania Supreme Court held that damages had to be

apportioned according to their cause. The court reasoned that "it is implicit in the statutory scheme that liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused." 552 A.2d at 1041. Accordingly, the court in *Dale* held explicitly that, if an "employee has been injured partially by the employer's negligence and partially by other causes, whether those causes relate to a pre-existing condition or to a concurrent, contemporary cause," then the railroad "must pay damages only for those injuries attributable to its negligence." *Id.* See *Shupe* v. *New York Cent. Sys.*, 339 F.2d 998 (7th Cir. 1965) (plaintiff cannot recover damages that are not proximately caused by railroad's alleged negligence).

In stark contrast to the holding in *Dale* and *Shupe*, the Circuit Court in this case held and instructed the jury that it could not consider any other causes for respondent's ailments and expressly refused to require the jury to apportion damages on the basis of causes for which petitioner was not responsible. Instead, the court ordered the jury to impose full liability on petitioner "no matter how slight" the role its negligence played in causing respondent's ailment. Because it is clear that this instruction would have been erroneous if the case had been tried in Pennsylvania, certiorari is appropriate to assure uniformity in the application of the FELA.

2. Not only is there a conflict among the lower courts as to whether to apportion damages under § 51, but the holding below is inconsistent with the logic of this Court's decision in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994). In *Gottshall* the Court held that, ordinarily, "common-law principles" should inform the proper application of the FELA. The common law rule in favor of apportionment of damages is unquestionable. Restatement (Second) of Torts § 433A plainly requires apportionment of damages where, as here, "there is a

reasonable basis for determining the contribution of each cause to a single harm." There was certainly evidence concerning the relative impact of the various causes of respondent's respiratory ills and thus a reasoned basis for the jury to have apportioned damages if the court had not withdrawn the issue from the jury.

3. Finally, the decision below finds no support in this Court's decision in *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957). There, this Court adopted the rule that a jury question on negligence exists whenever "the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." *Id.* at 507. Thus, the Circuit Court was clearly correct in submitting the case to a jury because there was at least slight evidence that respondent was exposed to asbestos on the job and that it may have contributed to his medical condition.

But *Rogers* provides no basis for refusing to allow other causes to be considered in determining the amount of damages that properly can be asserted against the railroad. Indeed, the "slight negligence" standard is not the standard for imposing liability. As the Ninth Circuit correctly observed, "The Court in [*Rogers*], however, was not speaking of 'the test of liability of the railroad carrier' . . . but 'the test of a jury case.' " *Bertrand* v. *Southern Pac. Co.*, 282 F.2d 569, 573 (9th Cir. 1960). Thus, on its face *Rogers* does not speak to the apportionment issue and certainly does not hold that apportionment is impermissible.

To be sure, some lower courts have interpreted this Court's decision in *Rogers* as support for holding the railroad to be solely liable for all damages attributable to an injury if the railroad's negligence played any part, no matter how small, in bringing about the injury. See, *e.g.*, *Denton* v. *Southern Ry.*, 854 S.W.2d 885, 887-88 (Tenn. App. 1993). Not only is this reliance on *Rogers* misplaced, but also the resulting confusion among the lower

courts provides an additional reason for this Court to grant review in this case to clarify its earlier decision. In this case, as in *Denton*, *Rogers* was used to eliminate apportionment of damages under the FELA. If that understanding of *Rogers* is incorrect, the Court should grant the petition here to provide needed guidance on this issue.

* * * *

In this case petitioner was denied a jury instruction that would clearly have required the jury to apportion damages among the various causes of his illness. That instruction unquestionably would have been permitted if the case had been tried in Pennsylvania. The only reason not to review this case is because the West Virginia Supreme Court of Appeals denied petitioner's petition for appeal. There is nothing in federal law generally or the FELA specifically that requires West Virginia to grant appellate review as a matter of right. Nevertheless, the State's failure to provide such review should not undercut review by this Court of an issue that recurs and is vitally important to the proper administration of the FELA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 6, 1997

APPENDICES

APPENDICES

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd day of November, 1996, the following order was made and entered:

CLYDE SIRBAUGH, JR.,
Plaintiff Below,
Respondent

vs.

CSX TRANSPORTATION, INC., a corporation,
Defendant Below,
Petitioner

On a former day, to-wit, November 13, 1996, came the petitioner, CSX Transportation, Inc., a corporation, by Huddleston, Bolen, Beatty, Porter & Copen, Fred Adkins, Luke L. Lafferre and J. H. Mahaney, its attorneys, and presented to the Court its motion in writing for leave to file a second application for appeal out-of-time for the reasons stated therein. On this day, came the respondent, Clyde Sirbaugh, Jr., by Pratt, Bradford, Tobin & Alexander, and D. Jeffrey Ezra, and Britt, Douglas, Parsons & Thompson, and Terrance L. Britt, his attorneys, and presented to the Court his written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion.

A True Copy

Attest: /s/ Connie A. Bowling
Interim Clerk
Supreme Court of Appeals

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th day of October, 1996, the following order was made and entered:

No. 961163

CLYDE SIRBAUGH, JR.,
Plaintiff Below,
Respondent

VS.

CSX TRANSPORTATION, INC., a corporation,
Defendant Below,
Petitioner

On a former day, to-wit, May 17, 1996, came the petitioner, CSX Transportation, Inc., a corporation, by Huddleston, Bolen, Beatty, Porter & Copen, Fred Adkins, Luke A. Lafferre and J. H. Mahaney, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Berkeley County, rendered on the 16th day of February, 1996, with the record accompanying the petition. Thereafter, on the 23rd day of May, 1996, came the respondent, Clyde Sirbaugh, Jr., by Pratt, Bradford, Tobin & Alexander, D. Jeffrey Ezra and Robert B. Ramsey, and Terrance L. Britt, his attorneys, and presented to the Court his written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/ April G. Ramey
Clerk
Supreme Court of Appeals

APPENDIX C

IN THE CIRCUIT COURT
OF BERKELEY COUNTY, WEST VIRGINIA

Civil Action No. 92-C-23

CLYDE SIRBAUGH,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

DEFENDANT CSX TRANSPORTATION, INC.'S
REQUEST FOR CHARGE NO. 14.

The plaintiff in this case is not entitled to recover damages from any cause other than the defendant's alleged negligence, and the plaintiff has the burden of proving by a preponderance of the evidence what proportion, if any, of his alleged damages are caused by the defendant's negligence.

Thus, the plaintiff cannot recover for any injury or disease caused by smoking, nor can he recover for any aggravation of a work-related injury or disease which you find to have been caused by smoking or by any cause other than the defendant's alleged negligence.

Akers v. Norfolk & Western Railway Company, 417 F.2d 632 (4th Cir. 1969); *Shupe v. New York Central System,* 339 F.2d 988 (7th Cir. 1965), *cert. denied,* 381 U.S. 937 *Wingo v. N&W Ry. Co.,* 834 F.2d 375 (4th Cir. 1987).

APPENDIX D

Excerpt from Transcript

* * * *

[198] COURT: Okay, the cancer instruction called Supplemental Request for Charge Number 1 will be given. There is no objection?

MR. EZRA: I have never seen it. Is that the only one you sent?

COURT: That's the only new one. Now we have got the deferred ones. And I have done great violence to these, but you can already tell from my rulings on directed verdict motions. Defendant's Number 13 which is a contributory negligence instruction is gone with the wind. Exceptions are noted. Okay, Defendant's Number 5, also contributory negligence instruction, also suffers a similar horrific fate. Defendant's exception is preserved for the record. Defendant's Number 11, same type of instruction, same fate. Exceptions noted. Okay, the Defendant's Number 12, again contributory negligence instruction, so it is refused and exceptions are preserved. Defendant's Number 14, same fate. The smoking instruction. After I put you through all that trouble with putting that interrogatory in, I kind of feel guilty. But I just thought that was part of the record.

MR. LAFFERRE: Yes, sir.

[199] COURT: You know, and, I mean, I think I had to let it come in before I made up my mind finally on what I was going to do on the smoking issue. At least for purposes of making a record considering whatever there is. Defendant's Number 15 is—I have already ruled as a matter of law that Plaintiff could not have mitigated his damages. Defendant's exception noted. Now, 16 is sort of an aggravation. You know, we haven't really dealt with that in the motion for directed verdict, but I don't see—he is not suing for an aggravation for his—as Mr. Ezra pointed out, for his heart condition. So, it would

be, you know, I guess you could argue that smoking might have aggravated—might have aggravated his asbestosis, if the jury finds he has asbestosis, but I just—

MR. EZRA: I'm not sure there has been any testimony to that.

COURT: Well, and it ties into that mitigation issue. And I just don't think that there is enough there that the Court ought to permit the instruction. I'll note the Defendant's exception. Now, Plaintiff's Number 30, this is your aggravation instruction, and it is going to meet the same fate. Did you want to object to it?

MR. EZRA: No, Your Honor.

MR. LAFFERRE: Judge, I am curious here if the jury [200] considers that the Plaintiff's condition was his inability to do things, we have put in evidence one of the reasons he couldn't get out and walk around and so forth was because of the back problem that he had, and some of those injuries that happened after he left work.

COURT: He can't recover though unless it is something that ties into the asbestosis. And the jury has to find that there was asbestosis.

MR. LAFFERRE: Well, I guess it depends on what the Court considers the condition to be.

COURT: We all know he suffers from other diseases. And we understand—at least I understand that the claim against CSX is not that they aggravated those other diseases. But simply whether they caused the second disease, the existence of which is hotly contested in this case, asbestosis. And I think the instructions I will give to the jury will permit you to the jury—to argue to the jury. Now remember, if you find that he has asbestosis or asbestosis related disease, you can only award damages for those physical consequences that are peculiar to that disease, and not to another disease that we already know he has that the railroad had nothing to do with. I don't think they would object to that. I think that's causation. I mean, you know—well, maybe [201] they would.

MR. EZRA: Thinking off the top of my head, I don't have a problem with it.

COURT: Okay, let the record so reflect. Okay, now we are getting into a whole new area and it is basically the Rogers debate. And over even in the slightest language.

MR. EZRA: Is that 27, Your Honor?

COURT: Plaintiff's 27, Plaintiff's 15, Plaintiff's 8, Plaintiff's 23, Plaintiff's—no, no, 23 is different issue. And I don't think you are going to need 23 any more. Twenty-seven, 15, 8, all deal in one way or another by reference or directly with the concept of causation. And what degree, you know, must the negligence play a part in bringing about the injury. And basically after looking at that—well, it is—it was the Moore case. I think it is Fourth Circuit, isn't it?

MR. EZRA: It is, Your Honor.

* * * *

APPENDIX E

Excerpt from Transcript

* * * *

[22] If the railroad takes the position that its employees should have undertaken a course of action or conduct to protect themself, it was under a duty to supply the material necessary and inform him of such and promulgate work rules requiring the employee to apply the materials to or in the situation encountered.

In determining whether the CSXT knew or should have known that exposure to some substance would result in injury to the Plaintiff, you may look to the evidence in this case bearing upon what has been referred to as the state of the art. The term state of the art as used in this case means that knowledge—means that knowledge that was available in the medical, scientific, and industrial community at any particular period of time concerning the dangers from exposure to the substance in question.

Now the CSXT is not required to have known everything that is written in the medical or scientific journals. Instead it is for you to determine what a reasonably prudent employer during the period of the Plaintiff's alleged injurious exposure would have been expected to know about the dangers of exposures to those substances.

[23] It was the duty of the railroad to make and publish to its employees sufficient necessary rules and regulations and prescribe such proper and adequate procedures for them to follow as reasonable care under the circumstances then and there existing.

Even if precautions are taken for an employee's safety, the railroad cannot avoid liability under the FELA if further precautions were possible and reasonable and were not taken.

The duty of the railroad to provide its employees a reasonably safe place to work becomes more imperative as the risk to the employee increases.

In summary, if you find by a preponderance of the evidence that the railroad by and through its employees,

servants, officers, and/or agents failed to exercise reasonable care to provide Clyde Sirbaugh, Junior, with a reasonably safe place to work, reasonably safe conditions, tools, and equipment, or failed in any other way to exercise reasonable care under the facts and circumstances, then you may find the railroad was negligent.

The fourth element is whether an injury to Clyde Sirbaugh, Junior, resulted in whole or in part from the negligence of the railroad or its employees, officers, or [24] agents. In other words, did such negligence play any part, even the slightest, in bringing about injury to Clyde Sirbaugh, Junior.

It is important to remember that there can be more than one cause of an injury. The involvement of any other cause does not prevent a finding for Clyde Sirbaugh, Junior, as long as you find that the railroad's negligence played any part, no matter how slight, in causing injury to Clyde Sirbaugh, Junior.

If you find by a preponderance of the evidence that the railroad by and/or through one or more of its employees, officers, or agents was negligent, and Clyde Sirbaugh, Junior, was injured thereby, then you must fix the amount of money damages that will reasonably and fairly compensate him for any of the following elements of damages proven by the evidence to have resulted from such negligence of the railroad:

First, the nature, extent, and duration of the injury. Second, gentlemen, I am going to have to make some oral amendments here consistent with my other instruction.

MR. LAFFERRE: Yes, sir.

COURT: I am working from Number 28.

MR. EZRA: Yes, sir.

* * * *